APPENDIX I

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 15-CB-779

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO and The Boeing Company

Decision and Order

On December 30, 1968, Trial Examiner Ramey Donovan issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel, the Charging Party, and the Respondent each filed exceptions to the Decision, together with supporting briefs. The Charging Party filed a reply brief. Subsequently in response to an invitation of the Board, the Charging Party and the Respondent filed supplemental briefs. In response to the same invitation, statements of position were filed by the National Association of Manufacturers, and by the American Federation of Labor and Congress of Industrial Organizations, joined by the International Brotherhood of Teamsters and the International Union, UAW, as *amici curiae*.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the reply brief, the supplemental briefs, the statements of position *amici curiae*, and the entire record in the case. The Board adopts the Trial Examiner's findings of fact, but adopts his conclusions and recommendations only to the extent that they are consistent with the decision herein.

The essential facts of this case are not in dispute. Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter called IAM or the Union, and Boeing were parties to a collective-bargaining agreement effective from May 16, 1963 through September 15, 1965.[1] Upon the expiration of the contract, the Union commenced a lawful strike against Boeing at its Michoud plant in New Orleans, Louisiana, and at various other locations. The strike lasted 18 days. On October 2, 1965, a new contract was signed. The strikers returned to work on the following day. Both contracts contained maintenance-of-membership clauses, which required new employees to notify both the Union and the Employer of their desire not to join the Union within 40 days of accepting employment.

During the strike period, some 143 employees of a unit of approximately 1900 production and maintenance workers crossed the picket line and reported for work. All had been members of the Union during the contract period. One group of strikebreaking employees, numbering some 24, made no attempt to resign from the Union. The remaining 119 strikebreaking employees submitted their voluntary resignations, in writing, to both the Union and the Employer.[2] Many

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[1] At the time of the execution of the 1963 agreement, Booster Lodge 405 was not in existence. Boeing's Michoud, Louisiana, plant was considered a "Remote Location" unit, identified with the "Primary Location" unit at Seattle-Renton, Washington. Production and maintenance employees in the Michoud unit were represented by Aeronautical Industrial District Lodge No. 751, IAM, AFL-CIO, Seattle, a signatory to the contract with Boeing. Booster Lodge No. 405 came into existence sometime later in 1963, but the contract was not modified to reflect this event.

[2] The Union objects to the fact that notices of resignation were sent to District Lodge 751 rather than to Booster Lodge 405. However, since Booster Lodge 405 was not a party to the original contract, as explained in footnote 1 *supra*, it would appear that employees who notified District Lodge 751 were attempting to comply with contractual requirements. Moreover, District Lodge 751 notified Booster Lodge 405 of all resignations.

resigned from membership prior to reporting for work during the strike. Others resigned during the course of the strike, but returned to work before submitting their resignations.[3] All resignations were submitted after the expiration of the original contract and before the signing of the new one. All were submitted prior to the imposition of discipline by the Union.

In late October or early November 1965, the Union notified all strikebreaking employees that charges had been preferred against them under the International Constitution for "Improper Conduct of a Member" in "accepting employment . . . in an establishment where a strike . . . exists." Employees were advised of the dates of their trials, which were to be held even in their absence, and of the availability of union-member counsel. Prior to the strike, the Union had not warned members about the possible imposition of disciplinary measures. However, the IAM constitution provides that members found guilty of misconduct after notice and a hearing are subject to "reprimand, fine, suspension, or expulsion from membership, or any lesser penalty or combination." The constitution sets no maximum dollar limitation on fines.

Fines were imposed on all strikebreaking employees, regardless of whether, or when, they had resigned from the Union. Employees who did not appear for trial were fined $450, as were those who appeared and were found guilty. The fines of employees who appeared for trial, apologized, and pledged loyalty to the Union were reduced to 50 per cent of strikebreaking earnings. The level of fines was set by the union membership. There is no indication of the

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[3] Four-hundred-and-fifty dollar fines were imposed on 108 employees. Of these, 61 had resigned their union membership prior to reporting for work during the strike, and others resigned during the course of the strike. Reduced fines were imposed on 35 employees. The record as to the timing of their resignations is not clear.

method of computation. Strikebreaking employees earned between $2.38 and $3.63 per hour, or between $95 and $145 per 40-hour week. In some instances, earnings during the strike were supplemented by the inclusion of bonus or premium rates for weekends and overtime.

Reduced fines have been paid in some instances. Payments have averaged $40. None of the $450 fines has been paid. The Union has sent out written notices that the matter has been referred to an attorney for collection, that suit will be filed upon nonpayment of fines, and that reduced fines will be increased for $450 in the event of nonpayment. The Union has filed suit against nine individual employees to collect the fines (plus attorney's fees and interest). The outcome of the suits has not been determined.

A principal issue in this case is the legality of the Respondent's imposition of disciplinary fines upon individuals who had resigned from the Union before engaging in the conduct for which the discipline was imposed. The complaint alleges, and the Trial Examiner found, that the Respondent's action in fining employees in this category violated Section 8(b)(1)(A) of the Act. We agree with the Trial Examiner's conclusion.[4] However, as the Trial Examiner has not fully spelled out his reasoning in this regard, and in light of the views of our dissenting colleague, we believe that further explication of our reasoning is appropriate here.

Under Section 8(b)(1)(A) of the Act, it is an unfair labor practice for a labor organization to "restrain or coerce employees in the exercise of rights guaranteed in Section 7." Included among those rights is the right to refrain from

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[4] The Trial Examiner's reference to a "compounded" violation of Section 8(b)(1)(A) perhaps implies that the violation is merely derivative. On the contrary, we find, as spelled out more fully herein, that the very imposition of a fine on nonmembers violates the Act, regardless of the amount of the fine.

engaging in any of the protected concerted activities enumerated at the beginning of Section 7.

The levy of a fine is calculated to force an individual both to pay money and to engage in particular conduct against his will. This is true regardless of the ultimate collectibility of the fine. A man who is held up at gunpoint is coerced whether or not the gun is loaded. As with the levy of a fine, the coercion lies in the calculated threat and, as has been held, the "argument that the fines imposed were not collectible in a court of law, even if accepted is beside the point."[6] The imposition of a fine has immediate coercive consequences. Faced with the possibility of action against him, the employee may well be, for practical purposes, impelled to forego his statutory right not to honor the Union's picket line rather than risk involvement in a lawsuit whose outcome he cannot predict.[8] Or, should he choose to take that risk, he will find it necessary to hire counsel whose services he ordinarily would not require.

The Board has long recognized that a fine is inherently coercive.[7] Yet in situations where a union imposes disciplinary fines on its *members* the Board has held that the union does not violate Section 8(b)(1)(A).[8] The basis of the Board's holdings in these early fine cases was the proviso

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[6] See *N.L.R.B.* v. *American Bakery and Confectionery Workers' Local Union 300*, 411 F.2d 1122, 1126, (C.A. 7), enfg. 167 NLRB 596.

[8] We do not share the confidence of our dissenting colleague in the ability of the ordinary employee to evaluate the ultimate legal consequences of the union's act. Nor would we require him to attempt to do so.

[7] See e.g. *Minneapolis Star & Tribune Co.*, 109 NLRB 727, 738.

[8] *Ibid. See also Local 283, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW-AFL-CIO (Wisconsin Motor Corp.)*, 145 NLRB 1097; *Local 248 et al., United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO (Allis-Chalmers Mfg. Co.)*, 149 NLRB 67.

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to Section 8(b)(1)(A), which exempts "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership" from the coverage of that section. Although a union's membership rules may well be coercive, their enactment is specifically protected by the Act. In *Minneapolis, supra,* the Board construed the levy of the fine as the prescription of a rule with respect to the retention of union membership, and held that the union's conduct, which was protected by the proviso, therefore did not violate Section 8(b)(1)(A).

In affirming the Board's conclusions in *Allis-Chalmers,* the Supreme Court held that the body of Section 8(b)(1)(A) was not intended to reach the conduct of a labor organization in imposing and enforcing a fine upon its members for crossing an authorized picket line.[9] Thus, the Court found it unnecessary to pass on the Board's holding that the proviso protected the union's conduct. Nevertheless, the basis of the Court's holding was the underlying relationship between the union and its members. Throughout the opinion, the Court emphasized the right of unions to regulate their own internal affairs. Reference was made to the "contract theory" of union membership. And, finally, the Court cited the proviso to Section 8(b)(1)(A) as offering "cogent support for an interpretation of the body of Section 8(b)(1)(A) as not reaching the opposition of fines and attempts at court enforcement."

The significance of the membership relationship is that it establishes the union's authority over its members. In joining a union, the individual member becomes a party to a contract-constitution. Without waiving his Section 7 right to refrain from concerted activities, he consents to the possible imposition of union discipline upon his exercise of that right.[10] But the contract between the member and

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[9] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175.

[10] The power to discipline recalcitrant members is essential to the union's self-preservation. This coercive power is protected by the proviso to Section 8(b)(1)(A).

the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished.

In the case at bar, the Union's right to discipline employees terminated upon the employees' submission of their letters of resignation.[11] The attempted imposition of discipline for subsequent conduct was beyond the powers of the Union.[12] It was not consented to by the employees. Nor, in our view, was it protected by the proviso to the Act.

The holding in *Allis-Chalmers* was carefully restricted to the facts of that case. The Court expressly refused to pass on the legality of the imposition of a fine upon "limited members" of the union[13] It appears to us that in this reservation there was the implication that such a fine when levied against nonmembers constitutes a form of restraint and coercion proscribed by Section 8(b)(1)(A). The decisions in two subsequent fine cases reinforce that implication.

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[11] The Union takes the position that voluntary resignation from its ranks is impossible of achievement because its constitution and by-laws set forth no procedure for such resignations. As this argument is contrary to long-standing Board precedent, we reject it here. See *Communications Workers of America, CIO (New Jersey Bell Tel. Co.)*, 106 NLRB 1322, enfd. 215 F.2d 835 (C.A. 2); *Local Union No. 621, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO (Atlantic Research Corp.)*, 167 NLRB 610; *District Lodge 751, International Association of Machinists & Aerospace Workers, AFL-CIO (Boeing Co.)*, 173 NLRB No. 71. Moreover, as indicated *infra*, the Supreme Court in the *Scofield* case expressly sanctioned the strategy of leaving the union to avoid discipline.

[12] The Union's disciplinary authority was, as we hold, limited to conduct engaged in during the period of membership.

[13] While the court did not specifically refer to the fining of nonmembers, the cited reservation indicates the relevance of the membership issue.

In its recent *Scofield* opinion,[14] the Supreme Court summarized its construction of Section 8(b)(1)(A) as follows:

> [The section] leaves a union free to enforce a properly-adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced *against union members* who are free to leave the union and escape the rule. [Emphasis supplied.]

This suggests that the prohibitions of Section 8(b)(1)(A) encompass union rules which do not conform with the enumerated qualifications. Included in this latter category is a rule enforced against nonunion members. By observing that members could "leave the union and escape the rule," the Court seems to have envisaged the possibility that union members could, indeed, resign membership and avoid discipline.

In the *Shipbuilding Workers* Case,[15] the Supreme Court found unlawful a union's attempt to discipline members for filing charges with this Board before exhausting their intra-union remedies. The Court construed Section 8(b)(1)(A) as assuring a union freedom of self-regulation only "where its legitimate internal affairs are concerned." But the imposition of discipline upon nonmembers can hardly be deemed an internal affair.

Our dissenting colleague treats *Allis-Chalmers* as if it existed in a vacuum, overlooking subsequent decisions and the statutory provisions themselves. But to extend the *Allis-Chalmers* doctrine beyond the perimeters of the situation there involved is to emasculate the provisions of Section 8(b)(1)(A). Such a result can hardly have been intended by the Supreme Court. It should not be reached here. In the interplay between the statutory policy to prevent coer-

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[14] *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423.

[15] *N.L.R.B.* v. *Marine & Shipbuilding Workers*, 391 U.S. 418.

cion of employees for exercising Section 7 rights on the one hand, and the policy to permit unions to guide their internal affairs and determine their membership qualifications on the other, the former must prevail where the membership relation which justifies the latter is terminated.

For the foregoing reasons, we find that the Respondent violated Section 8(a)(1)(A) of the Act by imposing disciplinary fines upon resigners from its ranks, for acts committed after their resignations. We shall order the Respondent to cease and desist from such conduct, including attempts to collect the illegal fines through court proceedings.

Also at issue in this case is the legality of the Respondent's imposition of disciplinary fines upon two other categories of strike-breaking employees, those who crossed the picket line without resigning from the union, and those whose resignations were submitted after the commencement of strikebreaking activities but prior to the initiation of disciplinary action against them. The legality of the imposition of discipline upon members for conduct engaged in during the period of membership is clear.[16] Accordingly, we find that the Respondent did not violate Section 8(b)(1)(A) by fining the nonresignees. Nor, in our opinion, does the Respondent's failure to exercise its disciplinary authority with respect to the second group until after the submission of

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[16] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra.* As a majority of the Board (Members Fanning, Brown, and Jenkins), would find that the legality of union fines does not depend on their reasonableness, the Board does not adopt the Trial Examiner's findings, conclusions and recommendations on that issue. See *Arrow Development Corp.*, 185 NLRB No. 22, issued this day. For the reasons stated in his dissenting opinion in the *Arrow* case, Chairman McCulloch would examine the amount of the fines to determine their reasonableness in those situations where the union's imposition thereof and threatened or actual court action to collect such fines would in all other respects be lawful. Where expulsion from membership is clearly the only available method of enforcement, he would consider the size of a fine irrelevant.

their resignations affect the legality of its action. As the source of the Union's disciplinary authority lies in the contractual relationship between the organization and its members, it is to the rules of contract law that we turn in evaluating the Union's conduct. The provisions of a contract are enforceable, and a cause of action can be brought upon them, even after the expiration or termination of the agreement. The rights and duties created by an agreement are extinguished only prospectively by the termination thereof. Thus the termination of some employees' membership here did not affect the Union's subsequent assertion of rights which had accrued to the Union during their earlier period of membership, such as the right to discipline the employees for prior strikebreaking. The effect of these employee's resignations was only to extinguish the Union's future authority over them.

Accordingly, we further find that the Respondent did not violate Section 8(b)(1)(A) of the Act by fining former members for misconduct engaged in prior to their resignations from among its ranks. However, this conclusion does not legitimize the imposition of discipline for conduct engaged in after the resignations. We shall order the Respondent to cease and desist from such action, and to remit a prorata portion of the fine, so that what remains reflects only preresignation conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employees, who had resigned from and who were no longer members of the Union,

in the exercise of their rights guaranteed in Section 7 of the Act, by imposing fines against such employees because of their post-resignation conduct in working at the Michoud plant during the September 1965, strike, or by threatening to seek or seeking court enforcement of such fines.

(b) In any like or related manner, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Reimburse or refund to any employees, described in paragraph 1(a) of this Order, who have paid fines under the circumstances described in that paragraph, the amount of said fines imposed because of post-resignation conduct in working at the plant.

(b) Post at its office and meeting hall and at the Michoud, Louisiana plant of the Boeing Company, if the Company is willing, copies of the attached notice, marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 15, shall, after being signed by an authorized representative, shall be posted at the aforementioned locations, in conspicuous places, including all places where notices to employees are customarily posted, and reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by other material.

(c) Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[1] In the event this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that those portions of the complaints as to which no violation has been found be, and they hereby are, dismissed.

Dated, Washington, D. C., August 27, 1970.

JOHN H. FANNING,	Member
FRANK W. MCCULLOCH,	Member
HOWARD JENKINS, JR.,	Member

(Seal)

NATIONAL LABOR RELATIONS BOARD

Member Brown, concurring in part and dissenting in part:

I join with my colleagues in dismissing the allegations of the complaint with respect to the imposition of discipline upon members for conduct engaged in during their period of membership. However, I would also dismiss the remaining allegations concerning the imposition of fines upon purported resigners from the Union.

My colleagues' disposition of this question is predicated upon the premise that an employee, faced with the threat of a union fine, "may well be impelled to forego his statutory right not to honor the Union's picket line rather than risk involvement in a lawsuit whose outcome he cannot predict." But this is what *Allis-Chalmers* was all about. There, a union fine, or the threat of it, expressly designed to force employees to "forego [their] statutory right not to honor the Union's picket line" was nevertheless held not to violate Section 8(b)(1)(A) even though such a fine was collectible, or collected, in court. The Supreme Court reasoned that 8(b)(1)(A) was not intended to apply to this kind of coercion. If, as is the case here, a Union does not violate 8(b)(1)(A) by imposing or threatening to impose a collectible fine, it is difficult to see how a presumably uncollectible fine can be violative of that Section. Even if, as the majority reasons, the employee concerned may not be sufficiently knowledgeable to evaluate the Union's fine

as "un-collectible," and thus feel completely free to cross the picket line with impunity, he is plainly no more coerced than the full-fledged member.

A further consideration, ignored by my colleagues, impels me to this view. Each of the employees involved here, and in all other situations of which I am aware, was a member of the Union in all senses of the word before the strike began. Thus the fealty owed by a member to his union in effect came into play when the strike was authorized and began, and a "resignation" at that point was already a disloyal action from the standpoint of the Union and his fellow members. Moreover, I cannot conceive of a case arising where a union would "fine" someone who had never been its member at all. It is only because the employees here were, in the eyes of the Union, and pursuant to the Union's constitution and bylaws, still Union members, that the fines would have any impact at all upon them. In this respect, whether employees are still members of the Union for purposes of imposition of a Union fine, the proviso to 8(b)(1)(A), in express terms, applies to a union's rules for acquisition or retention of membership.[18]

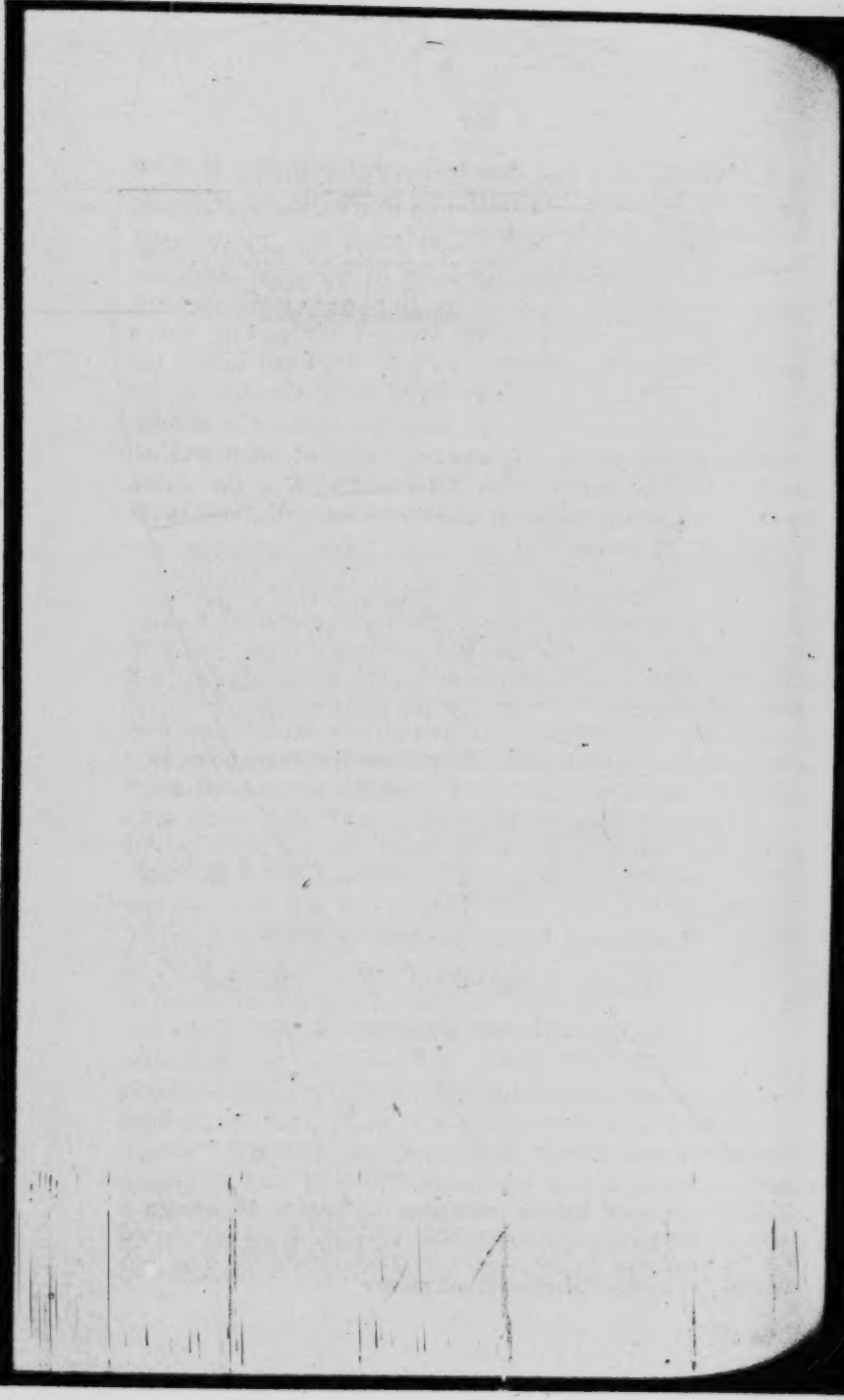
For all these reasons, I would find no violation of Section 8(b)(1)(A) of the Act in a Union's fining a nonmember or a purported nonmember.

Dated, Washington, D. C., August 27, 1970.

GERALD A. BROWN, Member

NATIONAL LABOR RELATIONS BOARD

[18] The cases cited by my colleagues in footnote 11 concern a Union's application of its membership rules to his job tenure, and thus are inapposite to the instant situation, where the rules pertain solely to another internal union matter.



APPENDIX II

COLLECTIVE BARGAINING AND STRIKE PROVISIONS OF NATIONAL UNION CONSTITUTIONS

INTRODUCTION

Herbert J. Lahne of the Department of Labor recently prepared a report analyzing collective bargaining provisions of national union constitutions.

Parts of the tabulations which he used in the development of his report have been condensed and combined into the attached lists which commissioners may find useful for reference. The first tabulation is of provisions relating to strike procedures; the second is of provisions relating to bargaining.

In his report Mr. Lahne makes it clear that this survey covers national constitutions only. District or local constitutions may include more. In addition he has pointed out that procedures have developed which supplement constitutional provisions, so that a degree of tradition fills in some of the gaps in these lists.

In the
Supreme Court of the United States
October Term, 1971

No. 71-711

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

GRANITE STATE JOINT BOARD,
TEXTILE WORKERS UNION OF AMERICA,
LOCAL 1029, AFL-CIO

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIEF FOR THE GRANITE STATE JOINT BOARD, TEXTILE WORKERS UNION OF AMERICA, LOCAL 1029, AFL-CIO

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BRIEF FOR THE GRANITE STATE JOINT BOARD, TEXTILE WORKERS UNION OF AMERICA, LOCAL 1029, AFL-CIO

Opinions Below

The National Labor Relations Board initiated this case by its Complaint in Case No. 1-CB-1460(1-2) alleging that

the Granite State Joint Board, Textile Workers Union of America, Local 1029, (hereinafter referred to as the Union) violated Section 8(b)(1)(A) of the Act by warning two individuals that they would be subject to fines for strike-breaking. This complaint was heard by Trial Examiner Milton Janus, who filed his decision on June 4, 1969, recommending that the complaint be dismissed (Pet. App. 20a).[1]

Additional charges against the Union were filed in Cases Nos. 1-CB-1504(1-4) and 1-CB-1534. These two cases were consolidated, and the Board issued a new Complaint on the consolidated cases on October 20, 1969. Meanwhile, Case No. 1-CB-1460 was reopened and remanded by Order of the Board; it was consolidated with the other cases; and hearings were held before Trial Examiner Janus. He issued his second decision on April 8, 1970 (Pet. App. 37a). In that decision, he held that the fining of mid-strike resignees by the union and the attempted judicial enforcement of those fines violated section 8(b)(1)(A) of the National Labor Relations Act.

In the meantime, the Union had proceeded by writs of the Superior Court in the State of New Hampshire to bring suit against those individuals who had been fined for strike breaking in violation of the Union's rules and constitution. The writs were for collection of the fines and for reimbursement for monies advanced for the payment of insurance premiums for union members during the course of the strike (A103, Pet. App. 42a). These cases were consolidated, and a Motion to Dismiss filed by the defendants was denied after hearing by Charles J. Flynn, presiding Justice, in an opinion dated March 26, 1970. (That opinion is attached to this brief. These cases are now awaiting trial in New Hampshire Superior Court.)

[1] "Pet App." refers to the appendix to the petition for a writ of certiorari. "A" refers to the separate appendix to the briefs.

After denying the Union's request for oral argument, a three-member panel of the Board upheld the Trial Examiner's decision two to one, member Gerald Brown dissenting (Pet. App. 13a-19a). The Board filed an application for enforcement before the U.S. Court of Appeals for the First Circuit in Case No. 71-1063. The Court of Appeals denied the Board's petition for enforcement on June 29, 1971 (Pet. App. 1a-11a).*

The opinion of the Court of Appeals (Pet. App. 1a-11a) is reported at 446 F.2d 369. The decision and order of the National Labor Relations Board (Pet. App. 13a-19a) are reported at 187 NLRB No. 90.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1971 (Pet. App. 12a). The Solicitor General filed a Petition for a Writ of Certiorari on November 26, 1971. The writ was granted on March 20, 1972. The jurisdiction of this Court was invoked pursuant to 28 U.S.C. 1254(1).

Question Presented

Whether a member of a union, engaged in a lawful strike, may escape his obligation to refrain from strikebreaking by submitting a mid-strike resignation to his union and then engaging in strikebreaking?

Statutes Involved

Sections 7 and 8(b)(1)(A) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.) are involved in this case. In relevant part, section 7 of the Act provides, "Employees shall have the right to self-organization, to form, join or assist labor organizations

* The decision has been noted in 85 Harvard L. Rev. 1669, 6 Suffolk Law Journal 257.

. . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

The pertinent parts of section 8(b)(1)(A) are as follows: "8(b) It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ."

Statement

The Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO, was the collective bargaining representative of the employees of the International Paper Box Machine Company[1] for more than twenty years. There were approximately 160 employees in the collective bargaining unit. All but three or four of these workers voluntarily joined the Union (Pet. App. 22a).[2]

The Union and the Company were parties to a three-

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[1] Hereinafter referred to as the Company.

[2] Membership in the Union was voluntary. (A. 21) No one was required to become a member as a condition of employment. The expired collective bargaining agreement contained a maintenance of membership clause which provided that all employees who were Union members or who joined the Union were required to maintain membership in good standing as to payment of dues. (A. 30) There was also a checkoff clause under which the Company agreed to deduct Union dues from the weekly wages of an employee who authorized it in writing. (A. 30)

Employees who decided to join the Union signed a combined membership acceptance and dues deduction authorization card. The dues deduction authorization was automatically renewed for yearly periods unless revoked during a ten day period after the termination of the contract or end of the year. (A. 34) The check-off authorization form for dues was irrevocable except during the specified annual ten-day periods.

year collective bargaining agreement which expired on September 20, 1968 (Pet. App. 24a). Negotiations for a renewal Agreement were unsuccessful; and at a membership meeting, six days before the scheduled expiration of the 1965 Agreement, the union membership unanimously voted to strike if no agreement was reached by September 20, 1968 (Pet. App. 22a, A29). All thirty-one employees involved in this case attended the meeting and voted to strike.[4] No new agreement was reached by the deadline and the economic strike commenced on September 20, 1968.[5] A few days after the strike began, the union membership met and passed a resolution providing that anyone aiding or abetting the Company during the strike would be subject to a fine of up to $2000.00 (Pet. App. 22a, A 18-19, 29).[6]

Soon after the start of the strike, the Company notified the Union that it was refusing to keep in effect the group life and health insurance coverage which had been provided under the 1965 collective bargaining agreement. As a part of its activity in support of the strike, the Union agreed to take over payment of the premiums necessary to keep the group policy in force (A 20-21). Each member signed an individual promise to repay the premiums paid in his behalf or notified the Union to discontinue his coverage (A 106). The Union also paid strike benefits to individuals who applied for them as well as distributing holiday turkeys. The charging parties participated in these activities (A 66, Pet. App. 41a).

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[4] See fn. 2 of the decision of the Court of Appeals, (Pet. App. 3a) and 446 F2nd at 370.

[5] The plant remained open but the only employees at work were supervisors and the 3 or 4 members of the bargaining unit who were not union members. About 160 employees who were union members honored the strike vote and maintained a token picket line, (Pet. App. 22a).

[6] The vote on the fine resolution was unanimous. See Trial Examiner's Decision of June 4, 1969, (Pet. App. 23a, A. 19, 29).

On November 5 and 25, 1968, while the strike was still in progress, two employees[7] sent letters of resignation to the Union (Pet. App. 23a, A 89, 96). The Union refused to accept these mid-strike resignations and warned both employees of their liability to fines for strike-breaking (Pet. App. 23a, 24a, A 32-33, 35-36). Radziewicz returned to work secretly for a few days before Thanksgiving but stopped working after receiving a second warning about the fine (Pet. App. 24a, A 17). The two employees filed unfair labor practice charges against the Union and shortly thereafter the Board issued a complaint alleging that the threat of fines in these circumstances violated Section 8(b)(1)(A) (Pet. App. 20a-21a). After a hearing, the Trial Examiner found no violation.[8]

After this decision, the Company wrote to all striking employees and advised them that the Union could not discipline them for post-resignation strikebreaking (A 107). The Union President in a reply letter warned all members that the Union officers would uphold the unanimous fine resolution and that any strikebreaker was subject to discipline and a fine of up to $2000 (Pet. App. 41a, A 79).

During the months that followed the Trial Examiner's June, 1969, decision, twenty-nine additional employees submitted mid-strike resignations and engaged in strikebreaking (Pet. App. 41a). Each of the thirty-one employees who returned to work was formally charged, duly notified, brought to trial and fined. Each strikebreaking individual received notice of his hearing, but all failed to attend and none paid the fine. The Union then commenced actions to collect the fines and other contract claims due and unpaid in the New Hampshire state courts (Pet. App. 41a-42a).

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[7] Felix Radziewicz and Maurice Kimball. Case 1-CB-1460-1-2.

[8] See Trial Examiner's Decision in 1-CB-1460-1-2, Pet. App. 20a.

This Union action resulted in new charges. The Board then issued a second complaint. A second hearing was held and Trial Examiner Janus found a violation of Section 8(b)(1)(A) (see p. 3 supra). The Board ordered the Union to rescind the fines against the thirty-one strikebreakers and to cease its efforts to collect those fines in the New Hampshire state courts.[9] However, the Board affirmed the Trial Examiner's ruling that the State court suits brought by the Union to obtain reimbursement for insurance premiums and possibly for strike benefits did not constitute an unfair labor practice (Pet. App. 47a).

The Court of Appeals for the First Circuit unanimously denied enforcement of the Board's order. The Court refused to interpret the 1947 amendment to Section 7[10] to authorize mid-strike resignations. Its interpretation was based on the meaning of the term "refrain" and the legislative history of the amendment. Support for the decision was found in *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967).

Summary of Argument

The decision in *Allis-Chalmers* established the right of a union to fine members who engage in strikebreaking. The Court of Appeals in the decision below rejected the contention of the National Labor Relations Board that by tendering a mid-strike resignation, a strikebreaker could avoid an established union penalty for violation of his union obligations. The decision of the Court of Appeals should be sustained on several grounds.

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[9] See Sup. Decisions of the NLRB and the Trial Examiner, Pet. App. 13a and 37a, respectively.

[10] The Taft-Hartley amendments added the following phrase to Section 7, "to refrain from any or all such activities. . ."

1. These strikebreakers entered into a contractual relationship with other union members. In this case the employees voluntarily entered into a contract of membership imposing upon them a duty of loyalty under the union constitution. The contract of membership was reinforced by a contract entered into with other members to go on strike. After the strike started all of the members voted as a matter of contract between themselves to fine anyone who engaged in strikebreaking. Consideration for these contract commitments is established by the reliance interest of each member in the promise and performance of every other member. The Union is entitled to enforce these contracts in the New Hampshire Courts.

2. The National Labor Policy entitles the Union to protect the right of the membership to engage in a lawful strike. The concerted action of the membership under Sec. 7 and 13 of the Act depends upon union solidarity. The Union is entitled to maintain discipline to protect the right to engage in concerted strike action. The members waived their Sec. 7 right to refrain from engaging in concerted action by joining in the strike and voting for the resolution to fine strikebreakers.

3. The National Policy supporting democratic union procedures reinforces the decision of the Court of Appeals. The policies of the National Labor Relations Act require support of the majority rule. In this case there was a unanimous vote to strike and a unanimous vote to fine strikebreaking activity. The Landrum-Griffin Act protects a member's right to internal democratic procedures and imposes a duty upon a member to exercise his democratic right to change the majority rather than to engage in individual strikebreaking.

4. The Union has a right as a matter of internal union policy under its constitution to determine the validity of an attempted resignation free from interference by the Board. The Board has been excluded from the regulation of internal union affairs by Congress. In this case the Board has improperly attempted to support employer intermeddling in union affairs contrary to the National Labor Policy by denying the Union the right to decide its own resignation policies and procedures and to enforce those policies by appropriate legal action in the state courts.

Argument

I. The National Labor Policy Supporting Concerted Activity Entitles the Union to Enforce the Contract Obligations.

The proposition that a Union may fine members who engage in strikebreaking was settled by this Court's decision in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). There it was held that a union did not violate Section 8(b)(1)(A) by fining strikebreakers and enforcing the fines through judicial process. Under this decision, the action of this Union would have been upheld but for the purported resignations of these strikebreakers. The only real distinction between this case and *Allis-Chalmers* is that mid-strike resignations were submitted by these strikebreakers immediately before they engaged in strikebreaking. An examination of the rationale of *Allis-Chalmers* leads to the conclusion that the distinction relied upon by the Board is a meaningless one. At 388 U.S. 181, the Court stated,

> Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '*the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent* . . . .' (Emphasis added.)

The Court of Appeals quoted this language with approval (Pet. App. 8a) (446 F.2d at 372-3).

As Mr. Justice White pointed out in his concurring opinion: — ". . . The Court seems unanimous in upholding the rule against crossing picket lines during a strike and its enforceability by expulsion from membership." *Allis-Chalmers* 388 U.S. at 199.

The Board decision holding that a mid-strike resignation precludes union discipline of a strikebreaker subverts the holding and rationale of *Allis-Chalmers*. It would give each member an automatic absolution from the rule of *Allis-Chalmers* by simply stating, "I resign".

The Court of Appeals in the decision below refused to follow the Board's argument. It followed the Union position based upon the contract commitments made by each member. Essentially, there were three interlocking contract commitments made by these employees which the Union is seeking to enforce in the Courts of the State of New Hampshire.

The first contract is the contract of membership.

The Union is a voluntary unincorporated association. Membership is voluntary. Each of the individuals involved

in this case voluntarily joined the Union. There were no pressures of a union security clause exerted on these individuals to impel them to sign the contract for membership. These were mature men who exercised their freedom of choice to become part of the Union organization. Each individual who freely became a member of the organization assumed the membership obligations. As the Board phrased it in the *Boeing Case,* relied on for its decision in this case: "In joining a Union, the individual member becomes a party to a contract-constitution." *Booster Lodge 405 International Association of Machinists* (the Boeing Company) 185 NLRB No. 23, 75 LRRM 1004 (1970) enf'd in material part sub nom *Booster Lodge No. 405, I.A.M. AFL-CIO* v. *N.L.R.B.*, 79 LRRM 2443 (C.A.D.C. 1972).

Even if the contention is made that an individual can resign from a voluntary association at any time, a resignation from membership does not allow the individual to escape from the obligations which were incurred as a result of membership. This is a standard contract law. A person may enter into a contract or not as he sees fit. Having entered into a contract he may choose to withdraw or break the contract at any time, but such a withdrawal will not allow him to avoid the obligations of the contract. This is the essence of the Union's position in this case. It is an axiom of common law that such a contract is valid and enforceable.

Restatement of Contracts, Section 17 — Illustration 1 states: "A becomes a member of an unincorporated society and by so doing promises to pay dues to the society. He is bound by a contract."

Int'l. Assn. of Machinists v. *Gonzalez,* 356 U.S. 617 (1958)

N.L.R.B. v. *Allis-Chalmers Mfg. Co.,* 388 U.S. at 182-3.

The second contract was the contract to strike, and this contract was reinforced by a third contract agreement to impose a fine on any member who aided the Company during the strike.

These individuals who voluntarily joined the organization agreed by unanimous vote to commit themselves and the Union to a strike. At that time the members recognized a special concern over the obligations which each member had to the other members in undertaking the strike. Accordingly, the members undertook to reinforce the Constitution and By-Laws with a Resolution which provided for the imposition of a fine of up to Two Thousand ($2000) Dollars for any individual who undermined the concerted action commitment by aiding and abetting management. This was adopted unanimously as an exercise of their rights under the contract-constitution. Freedom to contract is one of the fundamental policies of the Act. Cf. *H. K. Porter, Inc.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

The Labor Management Reporting and Disclosure Act (Landrum-Griffin), Section 101 (a)(2), 29 U.S.C. 411 (a)(2) expressly preserves to Unions "the right to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." Pursuant to this right, the Union adopted the rule providing for the fining of disloyal members whose strikebreaking activities interfered with the mutual obligation of every member to remain loyal to his contract obligation to strike.

This case has developed into a test of the Union strike vote and resolution. On the assurance of the Company that they could break their union commitment with impunity, the charging parties broke their contract of membership and broke their commitment to carry on a strike by crossing

the picket line and returning to work. The Board seeks to insulate the charging parties from the consequences of these broken promises and violations of their Union obligations of loyalty, a policy the Court of Appeals expressly rejected.

At one time in the development of contract law, there was concern over the adequacy of consideration for a contract involving a voluntary commitment to an organization. For example, where a charitable or other organization solicited pledges of funds for construction or other common project, the voluntary act of subscribing to the fund was held enforceable as a contract since it established a commitment to concerted action under which other donors were induced to subscribe. Consideration stemmed from the concerted aspect of the enterprise, each donor induced every other donor to make a commitment in the common enterprise. The right to resign from such a voluntary commitment does not relieve a donor from his obligation.

American Law Institute Restatement of Contracts, Section 90

Corbin Contracts, Sec. 198

Allegheny College v. *National Bank*, 246 N.Y. 369, 159 NE 173 (Cardoza) (1927)

Martin v. *Meles*, 179 Mass. 114, 60 NE 397 (Holmes) (1901)

The same situation is inherent in the strike action of the Union. Each member is induced to engage in the strike because of the commitment of all of the other members to engage in the strike. It is, of course, only the concerted action which makes the strike possible.

In the decision below, the Court stated,

"We can imagine a case involving three hypothetical employees whom we shall call Jones, Smith and Parks. Initially, Jones is anxious to strike but Smith and Parks hesitate finally acquiescing on the condition that all agree to stick it out for the duration of the strike. We suggest that this kind of mutual reliance is implicit in all strike votes; many employees would hesitate to forego several weeks or months of pay if they knew their cohorts were free to cross the picket line at any time merely by resigning from the union. An alternative theory, also suggested by the subscription cases, is that the union can enforce an employee's agreement to strike since it has embarked on the strike in reliance on his promise to honor it." Pet. App. 6a, 7a, 446 F.2d at 372.

The reliance factor which makes contracts pledging future support enforceable is especially relevant to the pledge of support for a strike. The reliance factor and the need for discipline to support the common project becomes so overwhelming that commentators have likened it to treason.

"The constitution is the union's charter of government. It orders the relationship of the union and its members to preserve and promote organizational effectiveness. A prominent organizational need is the ability of the union to prosecute a strike. It is impossible to suppose, from the viewpoint of either the union as an institution or of any member as part of that institution, that the constitution allows desertion from the ranks in the midst of a strike. . . . [N]egotiations are carried on with the prospect of an immediate or possible break of diplomatic relations and a resort to force. If the break comes, the union goes

to war and the need for discipline is obvious. The employer is the enemy; giving him any aid or comfort is treason. To supply him with labor is to furnish him the weapon with which the battle is fought and is clear treason."

Summers, *Disciplinary Powers of Unions*, 3 Ind. & Lab., Rel. Rev. 483, 489. Summers, *Legal Limitation on Union Discipline*, 64 H.L.R., 1049 at 1059. Cox, *Law and National Labor Policy*, 110. *Burke* v. *Locomotive Engineers*, 286 F. 949 (D.Ct. Md. 1922)

Under this theory a worker who joins a strike is similar to a volunteer for military service or a seaman signing on for a voyage. He is under strict discipline for the duration. If or when he attempts to resign from his duties and obligations in mispassage he has committed a criminal act and is subject to summary discipline.

The duty of loyal support inherent in every contract of association finds its cardinal expression in the obligation to refrain from strikebreaking. Every member depends on every other to withhold his labor from the struck employer in order to make the strike effective. The least that each member is entitled to expect of the other is that all who are pledged to the common cause at the beginning of the struggle will fulfill their obligation to carry through for its duration. Accordingly, a mid-strike resignation from a union, however efficacious it may be to sever other membership obligations, should not as a matter of the fair interpretation of the relationship be given the effect of relieving the resignee of his duty to refrain from strike-breaking at the very moment when its observance counts most.

It is plain that the union constitution as the governing instrument cannot be reasonably interpreted to mean that a mid-strike resignation has the expected effect of author-

ising the defector to break the existing strike. On the contrary, "derived from implied covenants of good faith and fair dealings" which inhere in every contract, the least that membership in the Union contemplates is that the obligation to refrain from strikebreaking, undertaken before the strike and activated by it, shall endure for the duration of the strike.

In other situations not bolstered by the fundamental importance of the strike, the Board has applied a well established rule preventing the withdrawal of a member of a voluntary collective bargaining association. (The voluntary association might be made up of a group of employers or unions.) In these cases, once a party has joined or participated in an association bargaining group, no withdrawal is permitted except by mutual consent. A party that attempts to withdraw in the midstream of negotiations is held to have committed an unfair labor practice by the Board. Under established Board precedent, once negotiations start, a party that attempts to withdraw from the voluntary association is bound by the obligations incurred by the association both before and after withdrawal. *Thirty-First Annual Report of the National Labor Relations Board* at p. 89; *Thirty-Third Annual Report of the National Labor Relations Board* at p. 92. The Board does permit withdrawal prior to the start of negotiations by proper seasonable notification to the parties; but after negotiations have started, withdrawal is prohibited since it disrupts the reliance of the parties on the group action. *Retail Associates, Inc.*, 120 NLRB 388 (1958); *Sheridan Creations, Inc.*, 148 NLRB 1503 (1964), *enf'd sub nom. N.L.R.B.* v. *Sheridan Creations, Inc.*, 357 F.2d 245 (2 Cir. 1966), *cert. den.* 385 U.S. 1005 (1967); *Evening News Assn.*, 154 NLRB 1494 (1965), *enf'd sub nom., Newspaper Publishers Assn.* v. *N.L.R.B.*, 372 F.2d 569 (6 Cir. 1967); *N.L.R.B.* v. *Paskes*,

405 F.2d 120 (C.A. 2 1969).[11] Courts have applied the same rule to business associations, *Martin* v. *Meles*, supra, p. 11; *Pacific Coast European Conference* v. *F.M.C.*, 439 F.2d 514 (C.A.D.C. 1970).

It is submitted that this is the correct application of Section 7 under prevailing contract law and the basic policies of the National Labor Relations Act. An employee has the option of engaging in concerted activities or refraining from engaging in concerted activities under Sec. 7. However, once an employee has elected to exercise his option by a commitment to engage in a concerted activity, he has entered into a contract. The contract is based on the reliance of others to his commitment. It prohibits his withdrawal until the concerted enterprise is completed or until there has been a mutual agreement of all concerned to terminate the concerted enterprise.

If the Board properly applied Sec. 7 and the proviso of Sec. 8(b)(1), it would have prevented the mid-term attempted resignations just as the Board prevents withdrawal in mid-negotiations to an association member. This fine was a reasonable disciplinary rule, voluntarily prescribed by unanimous vote for application to membership obligations during a voluntary strike which was also voted on unanimously. It was an action squarely within the proviso of Section 8(b)(1). The doctrine of *Allis Chalmers* and *Scofield*[12] is in complete harmony with the construction of Sec. 7 of the Act spelled out above and adopted by the Court below. Resignations may be permitted to avoid con-

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[11] Chief Judge Aldrich of the Court of Appeals for the First Circuit makes this comparison in his opinion in *N.L.R.B.* v. *Field & Sons*, No. 71-1398 decided May 24, 1972.

[12] *Scofield* v. *National Labor Relations Board*, 394 U.S. 423 (1969).

certed action by an individual who desires to escape, but the time to exercise the right is before the contract to engage in the conserted action is undertaken, not after there has been a change of position by others in reliance on the collective promises of all the members.

This rule limiting effectiveness to the future is in keeping with well established contract principles dealing with terminations of a contract relationship. For example, where an exclusive franchise is granted under a contract terminable at notice and the franchise holder invests in a distribution facility for the supplier's product the unseasonable termination of the franchise will give rise to an extension of the effective date of termination. *Clausen & Son* v. *The Hamm Brewing Co.*, 395 F.2d 388 (8 Cir. 1968). See also Gellhorn, *Limitations on Contract Termination Rights*, 1967, Duke L. J. 465. Liberty to quit employment is subject to the implied contract disability that in future employment the employee may not use confidential information to the disadvantage of the former employer. *Junker* v. *Plummer*, 320 Mass. 76, 67 NE2d 667 (1946). Am. Law Inst. Restatement of Agency 395, 396b. Partners may terminate a partnership at any time but not without being held to account not only for matters prior to his termination but also for damages arising from a premature dissolution. Similarly, the obligations of the marriage contract continue after a divorce.

II. The National Policy Supporting Democratic Union Procedures Requires Support of the Union Position.

The National Labor Relations Act, 29 U.S.C. §151 *et seq.*, reinforced by the Labor Management Reporting and Disclosure Act, 29 U.S.C. §401 *et seq.*, is predicated on the democratic process. A majority vote binds the Union in establishing its collective bargaining rights under Sec. 9 of

the N.L.R.B. and in conducting its affairs after certification. Title I of the Labor Management Reporting and Disclosure Act insures democratic processes. The protected right of a member in voicing his position in union affairs and prevailing upon a majority for support carries with it the obligation to act within the organization rather than to engage in subversive actions.

The failure of these strikebreakers to bring their position to the attention of the Union membership is of critical importance in this aspect of National Policy. In the *Scofield* case, apparently relied on by the Board for its *dicta*,[13] this Court recognized the obligation of a union member who declines to participate in a union-sponsored concerted activity to bring his position to the attention of the membership. At 394 U.S. 435, the Court said:

> "If a member chooses not to engage in this concerted activity *and is unable to prevail on the other members to change the rule*, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result from extra work, at the same time enjoying the protection from competition, the high piece rate, and the job security which compliance with the union rule by union members tends to promote." (Emphasis added.)

Had these strikebreakers taken that approach, the strike might have terminated before anyone engaged in strikebreaking. Sound democracy rather than subversion would have been supported. In *Vaca* v. *Sipes*, 386 U.S. 171 (1967) this Court pointed out that in order for the collective bargaining process to function properly, individual interests must be subordinated to the combined interests of all employees.

[13] Brief for the National Labor Relations Board, p. 12.

The National labor policy which forms the underpinning of the decision in *Allis Chalmers*, puts special emphasis on the democratic concept of majority rule.

At 388 U.S. 180 the Court said,

"Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . The employee may disagree with many of the Union decisions but is bound by them. 'The majority rule concept is today unquestionably at the center of our federal labor policy.' 'The complete satisfaction of all those who are represented is hardly to be expected.' "

Where a labor organization freely chosen by a majority of the employees takes collective bargaining action by majority vote, the Courts have enforced the majority rule against defecting individuals or minority counter actions. For example, individual contracts negotiated for private advantages over the collective bargaining agreement were held to be disruptive of industrial peace and a violation of the Act. *J. I. Case* v. *N.L.R.B.*, 321 U.S. 332 (1944). Similarly, minority group negotiations were held in violation of the Act in *Medo Photo Supply* v. *N.L.R.B.*, 321 U.S. 678 (1944), *Order of R. R. Telegraphers* v. *Railway Express*, 321 U.S. 342 (1944) reached a similar result with respect to the Railway Labor Act. Minority strikes to protest majority union decisions, have met the same result. *N.L.R.B.* v. *Sunbeam Lighting Co.*, 318 F.2d 661 (C.A. 7 1963); *Plaste-Line Inc.* v. *N.L.R.B.*, 278 F.2d 482 (C.A. 6 1960); *Harnischfeger Corp.* v. *N.L.R.B.*, 207 F.2d 575, (C.A. 7 1953); *Rocket Freight Lines* v. *N.L.R.B.*, 427 F.2d 202 (C.A. 10 1970). All these situations are parallel to the instant case where a minority group attempted to subvert the majority decision

to engage in a continued strike. The Board's decision in this case attempts to reverse established policy. The majority rule reinforced by the unanimous strike vote and the separate unanimous resolution of the membership to fine strikebreakers are casualties of the Board's ruling.

The decision of the Court of Appeals is based upon a waiver of Sec. 7 rights by those who engage in a strike until the termination of the strike. This is consistent with the majority rule democratic principle. A majority vote authorized the strike, and a majority vote of the membership could have terminated the strike.[14] However, there is no evidence that any of the 31 charging parties ever attempted to convince their fellow union members to terminate the strike. There is no evidence to indicate that they ever attempted to influence a majority to support their position. The decision of the Board violates the democratic underpinning of the Act and the National Labor Policy.

III. The National Labor Policy With Respect to the Strike Weapon in Collective Bargaining Requires the Decision Below To Be Sustained.

Allis Chalmers points out that the preservation of the right of a union to strike is fundamental to national labor policy. As the Court explained in *Allis Chalmers* at 388 U.S. 180,

> "[N]ational labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees . . . have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy, therefore, extin-

[14] See footnote 6 of the decision of the Court of Appeals, 446 F.2d [illegible], Pet. App. 7a.

guishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."

If members can break a strike with impunity by tendering resignations before strike breaking, the employer is tempted to inter-meddle in union affairs and appeal to individuals over the Union rather than negotiate collectively on wages, hours and working conditions. *Universal Oil Products (Norplex Division)* v. *N.L.R.B.*, 445 F.2d 155 (C.A. 7 1971); *N.L.R.B.* v. *Borg Warner*, 356 U.S. 342 (1958). This is the background of the instant case where the Company by individual letters solicited strikebreakers by assuring them that a resignation would free them from their obligations. It also subverts the obligation to bargain collectively by promoting individual return-to-work bargains in derogation of Sec. 8(a)(5) and 8(e) of the Act. Cf. *N.L.R.B. Erie Resistor Co.*, 373 U.S. 221 (1963).

Congress has set national policy protecting the right to strike in many contexts, including specific policies against strikebreaking. The protection of the right to strike in Section 13 has continued through every revision of the Act. In setting the standards for unemployment insurance, Congress required a qualifying state to provide that workers could not be deprived of benefits for refusing to engage in strikebreaking. Social Security Act of 1935, Sec. E(1)(3), 49 Stat. 620, 42 U.S.C. 301. The Byrnes Act, 49 Stat. 1899, 18 U.S.C. 407, makes interstate transportation of strikebreakers a criminal offense. Many states have passed similar legislation. Note on *Anti-Strikebreaking Legislation*, 115 U. Pa. Law Rev. 190.

What the Board has done by its decision in this case (and in *Boeing*, supra, p. 9) is to undermine the national labor policy of protection of the strike weapon. The Board

decision encourages strikebreaking. As one commentator stated:—

> "... I am of the view that the holding in *Boeing* is too much at variance with the spirit of *Allis-Chalmers* ... the strike should not be so easily undermined, at least to the extent that *Boeing* permits.". Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970, Duke L.J., 1105.

The Board evidently assumes that it can "invade or frustrate an overriding policy of labor law" by encouraging strikebreaking. It has no such authority under the N.L.R.A.[15]

IV. The Effectiveness of the Attempted Resignations Was a Matter for the Union—Not the Board—To Determine.

The proviso to sections 8(b)(1)(A) makes clear that a labor organization has the right to prescribe its own rules with respect to the acquisition or retention of membership. In *N.L.R.B.* v. *Int. Union of United Automobile Workers* (Paulding case), 320 F.2d 12 (C.A. 1 1963), the Court of Appeals held that specific provisions in the Union Constitution were effective in preventing untimely resignations of members submitted during a strike from taking effect. In this case, the Union Constitution and By-Laws have no such express provisions. However, the uncontra-

[15] The Board's reliance on *N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968), is misplaced. There was no issue of strikebreaking in that case; rather, it involved the question of whether a union violated section 8(b)(1)(A) by disciplining a member who filed unfair labor practice charges against the union. In finding a violation of the Act, the Court noted that this question brought "other considerations of public policy into play."

dicted testimony showed that by established practice the Union only honored resignations submitted during the "escape period" for the membership check-off of dues. (A. 24-25, 34). In fact, one of the charging parties, Hazen Johnson, submitted a previous resignation that was accepted and honored by the Union. (A. 60). The internal affairs of the Union, including the application of its own rules are the sole concern of the Union and its members not the concern of the Board. *Allis-Chalmers*, supra; *Universal Oil Products* v. *N.L.R.B.*, supra, p. 20.

The Board has recognized that the "unambiguous language of the proviso to Section 8(b) 1 (a) and the legislative scheme as a whole gave to the Unions the unimpeded right to prescribe the rules as to retention of membership. *International Typographical Union*, 86 NLRB 951, (1949) enforced *sub nom. N.L.R.B.* v. *I.T.U. et al.*, 193 F.2d 782 (7 Cir. 1951), *affirmed* 345 U.S. 100 (1953). The Board said:

> "In our view, by including this proviso Congress unmistakably intended to, and did, remove the application of a Union's membership rules to its members from the prescriptions of Section 8(b)(1)(A), irrespective of any ulterior reasons motivating the Union's application of such rules or the direct effect thereof on particular employees." 86 NLRB at 957.

This language was reinforced by the Board in *Wisconsin Motors*, 145 NLRB 1097 (1964), upheld on appeal *Scofield* v. *N.L.R.B.*, supra. The Board defined the limitation on its powers as follows:

> "But the Board has not been empowered by Congress to police a Union decision that a member is or is not in good standing or pass judgment on the penalties a Union may impose on a member..."

Footnote 3 in the *Scofield* case points out that discipli-

nary action in the enforcement of Union rules is a "federally unentered enclave."

In the *Wisconsin Motors* case, supra, the Board also pointed out that insofar as Congress was concerned with establishing a code governing the internal affairs of Unions, it placed jurisdiction not on the Board but in the Courts under the Landrum-Griffin Act — Labor Management Reporting and Disclosure Act of 1959 Title I. The provisions in Union Constitutions and By-Laws and the practices and procedures adopted by Unions with respect to their membership are outside the concern of the Board.

Congress recognized the present limitations on the power of the Board. Legislators who felt that the Board ought to have jurisdiction over strikebreaking fines introduced specific legislation to accomplish their purpose. For example, Senate Bill S1946-91st Congress, 1st Session would have made it an unfair labor practice for a labor organization to impose any fine or economic sanction against any person for exercising any rights under Section 7 of the N.L.R.B. This bill was not passed but until Congress enacts such legislation, it is clear that the Board cannot usurp Congressional authority to act in such matters.

This issue of the time when a resignation takes effect is one for the Union to determine under its rules.

North Jersey Guild Local 173 v. *Rakos*, 110 N.J., Sup. 77, 264 A.2d 453 (N.J. Sup. Ct. 1970)

The Court stated: "We find it unnecessary to determine whether the defendant's resignation took effect immediately or was subject to acceptance by the Local. We are satisfied that in either case he could not by submitting his resignation avoid discipline for his violation of the rules of the Local."

Walsh v. *Communications Workers Local 2336*, 259 Md. 608, 271 A.2d 148 (Md. Ct. of App. 1970).

The Board has upheld the trial and the fining of members who crossed a picket line and then tendered a resignation.

American Newspaper Guild, 186 NLRB No. 133 (1970).

The fact that there was no express provision of the Union constitution governing resignation does not preclude the application of the proviso to 8(b)(1)(A). Not all rules are written; the fact that a rule had evolved from past practice does not make it any less a rule.

The reasonableness of the rule is clear. First, it is important to note that the application for membership also included the dues checkoff authorization revocable only at specified times (Pet. App. 25a, A. 34). It was certainly reasonable for the Union to interpret the revocation procedures as applicable to the entire document and not just a part of it. Any other interpretation would allow a member to resign while his membership dues would continue to be deducted from his pay and remitted to the union, pursuant to the irrevocable check-off card.[16]

Second, the strike context of the resignation must be emphasized. The Union is under no obligation to aid the Company to undermine the Union by promoting strikebreaking resignations during the strike. These attempted resignations were not submitted by isolated individuals in good standing who attempted to leave a voluntary association. They were triggered by the Company intermeddling in the affairs of the Union. The recent decision of the Court of Appeals for the Seventh Circuit, *Universal Oil Products* v. *N.L.R.B.*, supra, is in point. The Court decided that insistence at the bargaining table that the union rescind its strikebreaking fines constituted an unfair labor practice by the Company.

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[16] Footnote 3 supra, p. 4.

As a matter of self-preservation, the Union was entitled to refuse to honor during the strike this action of members of submitting resignations and strikebreaking to destroy and undermine the Union. The outlawed yellow dog contract was an employer weapon of subverting Union action not far removed from this solicitation by the Company. Cf. *Hitchman Coal & Coke* v. *Mitchell*, 245 U.S. 229 (1917). Norris - La Guardia Anti-Injunction Act, Sec. 3, 29 U.S.C. 103. Certainly under these circumstances the Union was entitled to disregard the individual resignations as a free ticket for the disloyalty of strikebreaking regardless of their effectiveness for other purposes.

Conclusion

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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